D.B. CENTRAL EXCISE APPEAL NO.48/2006

Hindustan Zinc Ltd. VS. Assistant Commisi, Central Excise, Udaipur

Date : 13.9.2006

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HONBLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Dinesh Mehta for the appellant.
Mr. V.K. Mathur for the respondents.

BY THE COURT: (PER HON'BLE RAJESH BALIA, J.

Heard learned counsel for the parties.

In this appeal, the following substantial question of law has been framed:-

> Whether in the facts and circumstances of the case, the order of the tribunal under appeal can be justified in disallowing the modvat credit/ cenvat credit in respect of capital goods used by the assessee i.e. Captive mines in view of the decision of the Supreme Court in Vikram Cement cases?

The facts of the case are that the appellant is engaged in manufacturing of non-ferrous metals and their by-products and it also holds mining rights in Rajpura Dariba Mines in the District of Udaipur and the smelting units of the assessee are exclusively using mine in the raw material excavated from the mines in its factories.

The assessee claimed to avail modvat credit in respect of capital goods used at mines site which are otherwise eligible for the purpose of availing modvat credit as capital goods.

The claim of the assessee was denied inter alia on the ground that capital goods are not being used at factory as the captive mines are not part of the factory. The aforesaid decision of the adjudicating authority on the basis of which duty was levied and on the excess modvat credit availed according to the Revenue the interest in terms of Section 11 AB was also imposed. In addition thereto a penalty was also imposed

in terms and Rule 13 of the Cenvat Credit Rules, 2001 and Rule 25 of the Central Excise Rules, 2002.

The Commissioner (Appeals) vide his order dated 3/2/2004 held that the appellant was entitled to avail modvat credit used at captive mines but held that it is not entitled to avail modvat credit in respect of inputs used at mine site. However, the penalty in respect of modvat availed in respect of duty paid on inputs was set aside.

On appeal by Revenue in respect of allowing cenvat credit in respect of capital goods used at mine site, the order of Commissioner (Appeals) was reversed vide order under appeal.

However, the matter is now no more res integra and the question is answered affirmatively in favour of the manufacturer by the Supreme Court. In fact, the Supreme Court in its decision in J.K. Udaipur Udyog Ltd. VS. CCE 2004 (7) SCC 344 has held against the manufacturers holding that manufacturer is not

entitled to avail modvat credit in respect of inputs and capital goods used at captive mines away from the factory site.

Thereafter the Supreme Court in Birla Corporation's case 2005 186 ELT 266 held that conveyor belt through which raw material excavated from mines is transported to factory site is a part of factory and such conveyor belts and crushers are eligible for availing modvat credit on the duties paid on such capital goods.

Later on in a reference made to Larger Bench in M/s Vikram Cement in 2006 (2) SCC 351, it was held by the Apex Court that the view taken in J.K. Udaipur Udyog Ltd. about dis-allowability of modvat credit on duty paid on inputs and capital goods used at captive mines was erroneous and in that case the inputs used at mines site were held eligible for availing modvat credit in respect of duties paid on such inputs.

By yet another decision in Vikram Cement Vs. CCE 2006 (197) ELT 145 (SC) the principle was

extended to capital goods used at the captive mines site which can be treated as integrated part of the factory. The Court observed as under:-

> "As regards the Modvat/Cenvat credit on capital goods, if the mines are captive mines so that they constitute on integrated unit together with the concerned cement factory, Modvat/Cenvat credit on capital goods will be available to the assessee. On the other hand, if the mines are not captive mines but they supply to various other cement companies of different assessees, Modvat/Cenvat credit on capital goods used in such mines will not be available to the concerned assessee under the appropriate Modvat / Cenvat Rules. The matters are remanded to the respective original authorities for decision only on the above issue."

In view of the aforesaid, it must be held that the Tribunal was in error in holding that the assessee is not entitled to avail modvat credit in respect of capital goods used at captive mine site.

Accordingly, the appeal is allowed. The order of the Tribunal is set aside and it is held that assessee is entitled to avail modvat / cenvat credit on Duty paid on capital goods and inputs used at captive mine sites, if the same is otherwise eligible for such credit.

No order as to costs.

[GOPAL KRISHAN VYAS], J. [RAJESH BALIA], J.

babulal/